

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

FRANK A. RUST,) No. ED CV 10-00665-PA (VBK)
)
 Plaintiff,) ORDER RE DISMISSAL WITH
) LEAVE TO AMEND
v.)
)
SILVIA H. GARCIA, et al.,)
)
 Defendants.)
)

Pro se Plaintiff Frank A. Rust (hereinafter referred to as "Plaintiff") filed a civil rights Complaint pursuant to 42 U.S.C. §1983 pursuant to the Court's Order re Leave to File Action Without Prepayment of Full Filing Fees on May 12, 2010 ("Complaint"). Following issuance of an "Order re Dismissal with Leave to Amend," Plaintiff filed a First Amended Complaint ("FAC").

BACKGROUND

A. Complaint.

Plaintiff alleges that Defendants have wrongfully denied him proper medical care. Specifically, Plaintiff alleges that Defendants have denied him properly prescribed orthopedic boots (by an outside

1 orthopedist) based on non-medical personnel's disagreement with the
2 outside orthopedist's recommendation. (Complaint ¶ 19.) Plaintiff
3 alleges that this denial of his orthopedic boots, without consulting
4 the outside orthopedist, constitutes deliberate indifference to his
5 medical care. Plaintiff alleges he has serious health problems,
6 including high blood pressure, spinal problems (Plaintiff alleges he
7 underwent major spine surgery), and a stroke, which has affected his
8 movement and eyesight. (Complaint at ¶¶ 20-22.) Plaintiff alleges
9 prolonged delays in treatment have caused him to suffer unnecessary
10 psychological pain. Id. at 23. Plaintiff alleges that Defendants
11 have no legitimate penological interest in prohibiting Plaintiff's
12 prescription for orthopedic footwear. (Complaint ¶ 26A -I.) Plaintiff
13 alleges that Defendants retaliatory intent is proved by Defendant
14 Captain Smith's falsified statements. (Id. at 26 ¶ I.)

15 Plaintiff alleges the following causes of action: (1) Eighth
16 Amendment - cruel and unusual punishment (deny, delay or interfere
17 with medical treatment); (2) Eighth Amendment - right to adequate
18 medical care; (3) Eighth Amendment - right to proper medical care; (4)
19 Eighth Amendment - cruel and unusual punishment for failure to duty to
20 use due care; (5) Fourteenth Amendment - equal protection violation;
21 (6) Fourteenth Amendment - discrimination; (7) Fourteenth Amendment -
22 Equal Protection Clause violation; (8) cruel and unusual punishment -
23 deliberate indifference to serious medical needs; (9) cruel and
24 unusual punishment - custody administration's objection to prescribed
25 treatment; (10) cruel and unusual punishment - Defendants maliciously
26 deprived Plaintiff of alternative choice of treatment; and (11) cruel
27 and unusual punishment - Defendants denied Plaintiff substantial
28 compliance with the Americans with Disabilities Act. (Plaintiff's

1 Complaint C4-C10; ¶ 27-37.)

2 Plaintiff names the following Defendants: Matthew Cate, Director
3 of California Department of Corrections and Rehabilitation; Silvia H.
4 Garcia, Warden at Ironwood State Prison; Violet Wells, Associate
5 Warden at Ironwood State Prison; David Long, Chief Deputy Warden at
6 Ironwood State Prison; M. Payto, Associate Warden, Health Care
7 Operations at Ironwood State Prison; R. Johnson, Correction Captain,
8 Health Care Access at Ironwood State Prison; S. Smith, Correctional
9 Captain; G. W. Harris, Correctional Lieutenant Medical Appeals
10 Reviewer; L. Blair, Health Care Appeals Coordinator; C. Hammond, Staff
11 Service Manager I Appeals Examiner; N. Grannis. Chief Inmate Appeals;
12 S. Danner, Appeals Coordinator; D. Hall, Correctional Sergeant; and
13 Does 1-50. (Complaint at B2-B5.)

14 On June 18, 2010, Plaintiff filed a document entitled
15 "Supplemental Material on Denial of Administrative 602 Grievance
16 Procedures. A Continuing Problem at Ironwood State Prison."

17

18 **B. First Amended Complaint.**

19 Plaintiff alleges that Defendants use a sole vendor for orthotic
20 devices which he alleges creates a "legal conflict intrest [sic] of
21 all parties." (FAC ¶ 8(c).) Plaintiff alleges that after a two-year
22 process he is still without adequate prescribed orthopedic shoes.
23 (Id., ¶ 8(d).) Plaintiff alleges that on May 11, 2010, he visited the
24 outside vendor, orthotics specialist Dave Solist and was examined.
25 Plaintiff complains that he was "met with a very poor attitude and
26 unkind remarks/comments." (Id., ¶ 9(a).) Plaintiff alleges that on
27 June 25, 2010, he was given orthotic shoes. (Id., ¶ 9(c).) He asserts
28 the shoes did not work properly and that on the same day he tried to

1 return the shoes, but was denied. (*Id.*, ¶¶ 9(d), (e).) Plaintiff
2 complains that the construction of the orthotic boots he received is
3 inadequate and reflects "a clear cut case of improper, dishonest and
4 deceptive business practices ..." (*Id.*, ¶ 9(e).)

5 Plaintiff alleges that J. M. Lee, the Chief Medical Officer
6 ("CMO"), told him on July 21, 2010 that he could return the orthotic
7 boots. Plaintiff alleges that the outside vendor did not accept the
8 return. (*Id.*, ¶ 10.) Plaintiff asserts that he requested that a
9 different outside vendor orthotist be assigned, but he has not yet
10 received a response to this. (*Id.*, ¶ 12.)

11

12 **STANDARD OF REVIEW**

13 Because Plaintiff is seeking to proceed in forma pauperis, the
14 Court shall review such a complaint "as soon as practicable after
15 docketing." Pursuant to 28 U.S.C. §1915(e)(2), the District Court is
16 required to dismiss a complaint if the Court finds that the complaint
17 (1) is legally frivolous or malicious, (2) fails to state a claim upon
18 which relief may be granted, or (3) seeks monetary relief from a
19 defendant immune from such relief. 28 U.S.C. §1915(e)(2)(B) (re: all
20 in forma pauperis complaints).

21 A complaint may also be dismissed for lack of subject matter
22 jurisdiction, pursuant to Fed.R.Civ.P. 12(b)(1). Neitzke v. Williams,
23 319, 327 n.6, 109 S.Ct. 1827 (1989) (unanimous decision)(patently
24 insubstantial complaint may be dismissed under Rule 12(b)(1) for lack
25 of subject matter jurisdiction. When considering a dismissal, a Court
26 must accept as true all allegations and material facts and must
27 construe those facts in a light most favorable to the plaintiff.
28 Resnick v. Hays, 213 F.3d 443, 447 (9th Cir. 2000). However, a "court

1 [is not] required to accept as true allegations that are merely
2 conclusory, unwarranted deductions of fact, or unreasonable
3 inferences." Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th
4 Cir. 2001). Nor is a Court "bound to accept as true a legal
5 conclusion couched as a factual allegation." Ashcroft v. Iqbal, ____
6 U.S. ___, 129 S.Ct. 1937, 1949-50, 173 L.Ed.2d 858 (2009).

7 "To survive a motion to dismiss, a complaint must contain
8 sufficient factual matter, accepted as true, to 'state the claim to
9 relief that is plausible on its face.'" Iqbal, 129 S.Ct. at 1949
10 (quoting Twombly, 550 U.S. at 570). "A claim has facial plausibility
11 when the plaintiff pleads factual content that allows the Court to
12 draw the reasonable inference that the defendant is liable for the
13 misconduct alleged." Iqbal, 129 S.Ct. 1937, 1949, 172 L.Ed.2d 868
14 (2009)(citing Twombly, 550 U.S. at 556.) "The plausibility standard
15 is not akin to a 'probability requirement,' but it asks for more than
16 a sheer possibility that a defendant acted unlawfully." (Id.)
17 Although a complaint need not include "'detailed factual allegations,'
18 ... [a] pleading that offers 'labels and conclusions' or 'a formulaic
19 recitation of the elements of the cause of action will not do.'"
20 Iqbal, 129 S.Ct. at 1949 (quoting Twombly, 550 U.S. at 555. The
21 Complaint must contain "factual content that allows the court to draw
22 the reasonable inference that the defendant is liable for the
23 misconduct alleged." Iqbal, 129 S.Ct. at 1949. "[W]here the well-
24 pleaded facts do not permit the court to infer more than the mere
25 possibility of misconduct, the complaint has alleged - but it has not
26 'show[n]' - 'that the pleader is entitled to relief.'" (Id. at 1950
27 [quoting Fed.R.Civ.P. 8(a)(2) (internal brackets omitted)]. "[A] well-
28 pled complaint may proceed even if it appears that a recovery is very

1 remote and unlikely." Twombly, 55 U.S. at 556, 127 S.Ct. 1955
2 (quoting Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683 (1974).

3 In civil rights cases in which the Plaintiff appears pro se, the
4 pleadings must be construed liberally, so as to afford the plaintiff
5 the benefit of any doubt as to the potential validity of the claims
6 asserted. Karim-Panahi v. Los Angeles Police Dept., 839 F.2d 621, 623
7 (9th Cir. 1988). If, despite such liberal construction, the Court
8 finds that the complaint should be dismissed for failure to state a
9 claim, the Court has the discretion to dismiss the complaint with or
10 without leave to amend. Lopez v. Smith, 203 F.3d 1122, 1126-30 (9th
11 Cir. 2000). A pro se litigant should be given leave to amend, unless
12 it is clear that the deficiencies of the complaint cannot be cured by
13 amendment. Lopez, 203 F.3d at 1130-31; Cato v. United States, 70 F.3d
14 1103, 1106 (9th Cir. 1995); Noll v. Carlson, 809 F.2d 1446, 1448 (9th
15 Cir. 1987).

16

17 A. Federal Rule Of Civil Procedure 8(a).

18 Federal Rule of Civil Procedure 8(a)(2) requires "a short and
19 plain statement of the claim showing that the pleader is entitled to
20 relief," in order to "give the defendant fair notice of what the ...
21 claim is and the grounds upon which it rests." Bell Atlantic Corp. v.
22 Twombly, 550 U.S. 544, 127 S.Ct. 1955, 1964 (2007); Erickson v.
23 Pardus, 551 U.S. 89, 127 S.Ct. 2197, 2200 (2007). "The plaintiff must
24 allege with at least some degree of particularity overt acts which
25 defendants engaged in that support the plaintiff's claim." Jones v.
26 Community Redevelopment Agency, 733 F.2d 646, 649 (9th Cir. 1984).
27 Rule 8 is designed to provide Defendants with fair notice of the
28 claims against them and the grounds on which those claims rest. See

1 McKeever v. Block, 932 F.2d 795, 798 (9th Cir. 1991). When a complaint
2 fails to comply with Rule 8, it may be dismissed pursuant to
3 Fed.R.Civ.P. 41(b). McHenry v. Renne, 84 F.3d 1172, 1179 (9th Cir.
4 1996) (complaint properly dismissed under Rule 41 for failure to comply
5 with Rule 8 in Court Order).

DISCUSSION

For all of the following reasons, the First Amended Complaint
should be dismissed with leave to amend.

A. Plaintiff Has Failed to State a §1983 Claim Against Defendants Matthew Cate and Warden Garcia.

In order to state a claim under section 1983, a plaintiff must
allege that: (1) the defendants were acting under color of state law
at the time the complained of acts were committed; and (2) the
defendants' conduct deprived plaintiff of rights, privileges, or
immunities secured by the Constitution or laws of the United States.

18 See West v. Atkins, 487 U.S. 42, 48, 108 S.Ct. 2250 (1988); Karim-
19 Panahi v. Los Angeles Police Dept., 839 F.2d 621, 624 (9th Cir. 1988);
20 Haygood v. Younger, 769 F.2d 1350, 1354 (9th Cir. 1985) (en banc),
21 cert. denied, 478 U.S. 1020 (1986). Liability under section 1983 is
22 predicated upon an affirmative link or connection between the
23 defendants' actions and the claimed deprivations. See Rizzo v. Goode,
24 423 U.S. 362, 372-73 (1976); May v. Enomoto, 633 F.2d 164, 167 (9th
25 Cir. 1980); Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978).

26 A person deprives another of a constitutional right,
27 where that person "does an affirmative act, participates in
28 another's affirmative acts, or omits to perform an act which

1 [that person] is legally required to do that causes the
2 deprivation of which complaint is made." [citation] Indeed,
3 the "requisite causal connection can be established not only
4 by some kind of direct personal participation in the
5 deprivation, but also by setting in motion a series of acts
6 by others which the actor knows or reasonably should know
7 would cause others to inflict the constitutional injury."

8 Johnson v. Duffy, 588 F.2d at 743-44.

9 Plaintiff alleges no specific conduct linking Defendants Matthew
10 Cate and Warden Garcia to any wrongdoing. In other words, Plaintiff
11 does not allege that these Defendants proximately caused his
12 orthopedic boot problems. As such, Plaintiff has failed to state a
13 claim against these Defendants and they must be dismissed. See Taylor
14 v. List, 880 F.2d 1040, 1045 (9th Cir. 1989)(stating that supervisors
15 are liable for violations of their subordinates if the supervisor
16 "participated in or directed the violations, or knew of the violations
17 and failed to prevent them.").

18 Additionally, supervisory personnel generally are not liable
19 under 42 U.S.C. §1983 on any theory of respondeat superior or
20 vicarious liability in the absence of a state law imposing such
21 liability. See Redman v. County of San Diego, 942 F.2d 1435, 1443-44
22 (9th Cir. 1991), cert. denied, 502 U.S. 1074 (1992). A supervisory
23 official may be liable under §1983 only if he or she was personally
24 involved in the constitutional deprivation, or if there was a
25 sufficient causal connection between the supervisor's wrongful conduct
26 and the constitutional violation. See Id. at 1446-1447. To premise
27 a supervisor's alleged liability on a policy promulgated by the
28 supervisor, the plaintiff must identify a specific policy and

1 establish a "direct causal link" between that policy and the alleged
2 constitutional deprivation. See, e.g., City of Canton, Ohio v.
3 Harris, 489 U.S. 378, 385, 109 S. Ct. 1197 (1989); Oviatt v. Pearce,
4 954 F.2d 1470, 1474 (9th Cir. 1992). A "failure to train" theory can
5 be the basis for a supervisor's liability under §1983 in only limited
6 circumstances. See City of Canton, 489 U.S. at 387-90 (liability only
7 where failure to train amounts to deliberate indifference).

8 Plaintiff has failed to identify any particular policy or
9 policies promulgated by Defendants Matthew Cate and Warden Garcia
10 which allegedly had a direct a direct causal link to the alleged civil
11 rights violations about which Plaintiff is complaining. Additionally,
12 Plaintiff has failed to allege sufficient facts to support a "failure
13 to train" theory. Thus, the allegations of the FAC are insufficient
14 to state a federal civil rights claim upon which relief can be
15 granted.

16

17 **B. Plaintiff Has Failed to State a Claim under the Americans**
18 **with Disabilities Act or Rehabilitation Act.**

19 Plaintiff in conclusory language alleges that Defendants have
20 violated his Fourteenth Amendment right to equal protection clause and
21 have violated the Americans with Disabilities Act ("ADA") and the
22 Rehabilitation Act of 1973 ("RA").

23 In order to state a claim under Title II of the ADA, Plaintiff
24 must allege that (1) he is an individual with a disability; (2) he is
25 otherwise qualified to participate in or receive the benefit of the
26 prison's services, programs or activities; (3) he was either excluded
27 from participation in or denied the benefits of the prison's services,
28 programs or activities, or was otherwise discriminated against by the

1 prison; and (4) such exclusion, denial or discrimination was by reason
2 of his disability. 42 U.S.C. §12132; McGary v. City of Portland, 386
3 F.3d 1259, 1265 (9th Cir. 2004).

4 To state a claim under §504 of the RA, a plaintiff must show (1)
5 he is an individual with a disability; (2) he is otherwise qualified
6 to receive the benefit of a program or activity; (3) he was denied the
7 benefit of a program or activity solely by reason of his disability;
8 and (4) the program or activity receives federal financial assistance.

9 See 29 U.S.C. §794(a); Duvall v. County of Kitsap, 260 F.3d 1124, 1135
10 (9th Cir. 2001). Section 1983 is not a vehicle to vindicate statutory
11 rights secured by the ADA or the RA; rather, a plaintiff must sue
12 under those statutes directly. See Miranda v. Kitzhaber, 328 F.3d
13 1181, 1187-90 (9th Cir. 2003); Vinson v. Thomas, 288 F.3d 1145, 1156
14 (9th Cir. 2002), cert. denied, 537 U.S. 1104 (2003).

15 Plaintiff's general reference to the rights of disabled prisoners
16 under the ADA and the RA is not sufficient to meet his burden to plead
17 the elements of a claim under either statute.

18

19 C. Plaintiff Is Granted Leave To Amend To State An Eighth
20 Amendment Claim.

21 Plaintiff alleges eleven causes of action against Defendants. In
22 Plaintiff's first, second, third, fourth, eighth, ninth and tenth
23 causes of action, Plaintiff alleges that Defendants' conduct
24 constituted cruel and unusual punishment in violation of the Eighth
25 Amendment. Plaintiff alleges that Defendants have not provided him
26 with the correct orthopedic boots to ameliorate his pain.

27 "Denial of medical attention to prisoners constitutes an Eighth
28 Amendment violation if the denial amounts to deliberate indifference

1 to serious medical needs of the prisoner." Toussaint v. McCarthy, 801
2 F.2d 1080, 1111 (9th Cir. 1986), cert. denied, 481 U.S. 1069 (1987);
3 Estelle v. Gamble, 429 U.S. 97, 106 (1976). Deliberate indifference
4 occurs when prison officials deny, delay or intentionally interfere
5 with medical treatment or in the way in which prison officials provide
6 medical care. McGuckin v. Smith, 974 F.2d 1050, 1062 (9th Cir. 1992),
7 overruled on other grounds by WMX Tech., Inc. v. Miller, 104 F.3d
8 1133, 1136 (9th Cir. 1997); Hutchinson v. United States, 838 F.2d 390,
9 394 (9th Cir. 1988); Hunt v. Dental Dept., 865 F.2d 198 (9th Cir.
10 1989). Deliberate indifference may also be shown by a prison
11 official's attitude and conduct in response to a prisoner's serious
12 medical needs. Helling v. McKinney, 509 U.S. 25, 32-33 (1993);
13 Estelle, 429 U.S. at 104-05.

14 To state a deliberate indifference claim, a prisoner plaintiff
15 must allege both that the deprivation of medical care in question was
16 objectively serious, and that the defendant official acted with a
17 subjectively culpable state of mind. Wilson v. Seiter, 501 U.S. 294,
18 297, 111 S. Ct. 2321 (1991). The required showing of deliberate
19 indifference is satisfied when it is established that "the official
20 knew of and disregarded a substantial risk of serious harm to [the
21 prisoner's] health or safety." Johnson, 134 F.3d at 1398 (citing
22 Farmer v. Brennan, 511 U.S. 825, 837, 114 S. Ct. 1970 (1994)).
23 Indifference may appear when prison officials deny, delay or
24 intentionally interfere with medical treatment, or it may be shown by
25 the way in which prison physicians provide medical care. Jett v.
26 Penner, 439 F.3d 1091, 1096 (9th Cir. 2006).

27 The courts have recognized that deliberate indifference to
28 serious medical needs may be manifested in two ways: "It may appear

1 when prison officials deny, delay or intentionally interfere with
2 medical treatment, or it may be shown by the way in which prison
3 officials provide medical care." Hutchinson v. United States, 838
4 F.2d 390, 394 (9th Cir. 1998)(citing Estelle v. Gamble, 429 U.S. at
5 105). In either case, however, the indifference to the inmate's
6 medical needs must be purposeful and substantial; negligence,
7 inadvertence, or differences in medical judgment or opinion do not
8 rise to the level of a constitutional violation. Jackson v. McIntosh,
9 90 F.3d 330, 331 (9th Cir.), cert. denied, 519 U.S. 1029 (1996);
10 Sanchez v. Vild, 891 F.2d 240, 242 (9th Cir. 1989); Franklin v. Oregon
11 State Welfare Div., 662 F.2d 1337, 1344 (9th Cir. 1981).

12 Plaintiff must set forth with particularity specific facts
13 demonstrating each Defendant's "deliberate indifference" to
14 Plaintiff's medical condition. Plaintiff should state what acts that
15 Defendants did or failed to do to respect to Plaintiff's medical care.

16 Medical malpractice, even gross medical malpractice, does not
17 amount to a violation of the Eighth Amendment. Broughton v. Cutter
18 Lab, 622 F.2d 458, 460 (9th Cir. 1980). A dispute between a prisoner
19 and prison officials over the necessity for or extent of medical
20 treatment does not raise a claim under §1983. See Sanchez v. Vild,
21 891 F.2d 240, 242 (9th Cir. 1989); Shields v. Kunkel, 442 F.2d 409,
22 410 (9th Cir. 1971); Mayfield v. Craven, 433 F.2d 873 (9th Cir. 1970).

23 Even analyzing the claim under the Fourteenth Amendment,
24 Plaintiff has failed to state a claim. A "serious medical need"
25 exists if the failure to treat a prisoner's condition could result in
26 further significant injury or the unnecessary and wanton infliction of
27 pain. A prison official is "deliberately indifferent" if he knows
28 that a prisoner faces a substantial risk of serious harm and

1 disregards that risk by failing to take reasonable steps to abate it.
2 Farmer v. Brennan, 511 U.S. 825, 837 (1994). Knowledge is an
3 essential element of this claim.

4 Mere negligence in diagnosing or treating a medical condition is
5 not violative of constitutional standards. The inmate must
6 demonstrate that he was confined under conditions posing a risk of
7 "objectively, sufficiently serious" harm and that the offender had a
8 "sufficiently culpable state of mind" in denying the proper medical
9 care. Clement v. Gomez, 298 F.3d 898, 904 (9th Cir. 2002), citing
10 Wallace v. Baldwin, 70 F.3d 1074, 1076 (9th Cir. 1995).

11 Plaintiff's FAC alleges that Defendants have failed to provide
12 Plaintiff with the type of orthopedic boot that meets with Plaintiff's
13 satisfaction. A difference in opinion does not amount to deliberate
14 indifference to Plaintiff's serious medical needs. Sanchez v. Vild,
15 891 F.2d 240, 242 (9th Cir. 1989).

16 Although the Court doubts that Plaintiff can assert claims which
17 are sufficient to plead the constitutional deprivations of which he
18 complains, the Court will, nevertheless, allow Plaintiff one more
19 opportunity to file a Second Amended Complaint. Accordingly,
20 Plaintiff is granted leave to amend his Complaint to state facts which
21 support a claim of deliberate indifference against each individual
22 Defendant.

23

24 **D. Plaintiff Has Failed to State a Claim for Retaliation.**

25 Plaintiff alleges that he filed grievances related to the denial
26 of his orthopedic boots. Plaintiff alleges a fear of retaliation by
27 prison staff for his attempts through the grievance process to resolve
28 his claims. Id.

1 A claim may be stated under section 1983 for retaliation against
2 a prisoner's First Amendment right to file a prison grievance. Bruce
3 v. Ylst, 351 F.3d 1283, 1288 (9th Cir. 2003). "Within the prison
4 context, a viable claim of First Amendment retaliation entails five
5 basic elements: (1) An assertion that a state actor took some adverse
6 action against an inmate (2) because of (3) that prisoner's protected
7 conduct, and that such action (4) chilled the inmate's exercise of his
8 First Amendment rights,[] and (5) the action did not reasonably
9 advance a legitimate correctional goal." Rhodes v. Robinson, 408 F.3d
10 559, 567-68 (9th Cir. 2005) (footnote omitted). In Rhodes the Ninth
11 Circuit also indicated that an allegation of harm could be sufficient
12 if the inmate could not allege a chilling effect: "If [plaintiff] had
13 not alleged a chilling effect, perhaps his allegations that he
14 suffered harm would suffice, since harm that is more than minimal will
15 almost always have a chilling effect." Id. at 568 n.11.

16 A plaintiff asserting a retaliation claim must demonstrate a "but
17 for" causal nexus between the alleged retaliation and plaintiff's
18 protected activity (i.e., filing a legal action). McDonald v. Hall,
19 610 F.2d 16, 18 (1st Cir. 1979); see Mt. Healthy City School Dist. Bd.
20 of Educ. v. Doyle, 429 U.S. 274, 97 S.Ct. 568 (1977). The prisoner
21 must submit evidence, either direct or circumstantial to establish a
22 link between the exercise of constitutional rights and the alleged
23 retaliatory action. Pratt v. Rowland, 65 F.3d 802, 806 (9th Cir.
24 1995). Timing of the events surrounding the alleged retaliation may
25 constitute circumstantial evidence of retaliatory intent. See Pratt,
26 65 F.3d at 808; Sorranos Gasco, Inc. v. Morgan, 874 F.2d 1310, 1316
27 (9th Cir. 1989).

28 Here, Plaintiff in conclusory language alleges he filed

1 grievances related to the denial of the orthopedic boots. Plaintiff
2 claims his grievances were improperly screened out in retaliation for
3 his exercise of his First Amendment rights and not based on any
4 legitimate penological interest.

5 Plaintiff's claims related to his grievances being not processed
6 do not state a claim for retaliation. Plaintiff has failed to provide
7 specific details against each individual Defendant. Such details are
8 necessary for the Court to determine whether Plaintiff has stated a
9 claim against each individual Defendant, as is required by Section
10 1983. These details are also necessary for the Court to evaluate
11 whether Plaintiff has shown a link between the protected activity and
12 the destruction of his grievances.

13

14 **E. Plaintiff Fails to State a Claim Based on the Processing of**
15 **His Grievances.**

16 "An inmate has no due process rights regarding the proper
17 handling of grievances." Wise v. Washington State Department of
18 Corrections, 244 Fed. Appx. 106, 108 (9th Cir. 2007), cert. denied, 552
19 U.S. 1282, 128 S.Ct. 1733 (2008).¹ See Ramirez v. Galaza, 334 F.3d
20 850, 860 (9th Cir. 2003) ("Inmates lack a separate constitutional
21 entitlement to a specific prison grievance procedure."); Mann v.
22 Adams, 855 F.2d 639, 640 (9th Cir. 1998) ("There is no legitimate claim
23 of entitlement to a grievance procedure."). Thus, Plaintiff cannot
24 state a claim based on the mishandling or denial of his grievances.
25 Accordingly, Plaintiff's claims against Defendants N. Grannis, S.

26

27 ¹ The Court may cite unpublished Ninth Circuit decisions
28 issued on or after January 1, 2007. United States Court of Appeals
for the Ninth Circuit Rule 36-3(b); Fed.R.App.P. 32.1(a).

1 Danner, C. Hammond and G. W. Harris based on their handling of his
2 grievances must be dismissed.

3

4 **CONCLUSION AND ORDER**

5 In an abundance of caution, Plaintiff will be afforded an
6 opportunity to amend his FAC to attempt to overcome the defects
7 discussed above, and to allege a cognizable constitutional claim
8 Accordingly, **IT IS HEREBY ORDERED:** (1) Plaintiff's FAC is dismissed
9 with leave to amend; and (2) Plaintiff is granted 30 days from the
10 date of this Memorandum and Order within which to file a "Second
11 Amended Complaint." The Second Amended Complaint must be complete
12 within itself and shall not incorporate by reference any portion of
13 the original Complaint. Plaintiff may not add new parties without
14 leave of the Court. Failure to comply with the requirements set forth
15 in this Memorandum and Order may result in a recommendation that this
16 action be dismissed with prejudice.

17

18 DATED: July 29, 2011

19 /s/
VICTOR B. KENTON
UNITED STATES MAGISTRATE JUDGE

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